United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7510/62

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant.

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc. and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE-APPELLANT

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BRIEF FOR DEFENDANT-APPELLEE-APPELLANT

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. §1291.

CASE HISTORY

This is an action by the consignee of a shipment of optical equipment to recover for non-delivery of one of 12 packages which was carried from New York to Durban, South Africa on board the

S.A. Nederburg, a vessel operated by defendant-steamship company South African Marine Corporation, Ltd., South African Marine in turn commenced a third-party action against International Terminal Operating Co., Inc. ("ITO"), the stevedore and terminal operator who received plaintiff's shipment and loaded it on board Nederburg.

The decision of the United States District Court for the Southern District of New York was filed on September 9, 1976.(*3a) The decision awarded judgment to plaintiff but limited the amount of plaintiff's recovery to $500 in accordance with the terms of Clause 13 of South African Marine's long form bill of lading, (595a) which was incorporated by reference into the contract of carriage, (487a) and in accordance with Section 4(5) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1304(5). Final judgment was entered on October 13, 1976. Appellant, Elgie filed a notice of appeal on October 12, 1976 and was assigned Docket No. 76-7510. Appellee-Appellant South African Marine cross-appealed and was assigned Docket No. 76-7562. Oral argument of the previous appeal was heard in March, 1977.

*Reference to pages in Joint Appendix filed with previous appeal and designated as entire record for the present appeal. A copy of the District Court's decision on remand has been forwarded to this Court in quadruplicate by plaintiff's counsel.

On May 11, 1978 the Clerk of the Second Circuit Court of Appeals requested, by letter to all counsel, that the parties submit further views on the applicability of the Pomerene Bills of Lading Act, 49 U.S.C. §§81-124 to the issues raised in the appeal, with particular attention to Section 22 of the Act, 49 U.S.C. §102. That Section provides that the issues of a bill of lading may be liable without limitation in certain circumstances for damages incurred by the holder of a bill as a result of a misrepresentation on the face of the bill. Accordingly, the parties submitted further views by letter to the Court of Appeals.

On June 20, 1978 this Court handed down an opinion by Judges Feinberg, Waterman and Smith remanding the case to the District Court for specific findings concerning the applicability of the Pomerene Act. The opinion noted that the applicability of the Act might depend on (a) whether Elgie relied upon an alleged misdescription of the goods in the bill of lading issued by South African Marine, and (b) whether the damages suffered by Elgie were caused by any such misdescription. This Court also requested a specific finding as to whether the missing crate which is the subject of this action was actually loaded on board another South African

Marine vessel, the S.A. Morgenster, which sailed before the S.A. Nederburg.

The District Court on remand inquired whether any of the parties wished to present additional evidence. All parties, including the plaintiff, advised that they prefered to stand on the existing record.

On August 29, 1978, the District Court rendered a second opinion holding that the Pomerene Act did not apply to non-delivery of cargo, so as to void the package limitation of COGSA 46 U.S.C. §1304(5), where the loss of the cargo was negligent rather than intentional. Additionally, the District Court found, as fact, that the shipment in question had actually been loaded on board Morgenster.

Plaintiff, Elgie & Company, appealed from the District Court's decision on remand. Defendant-appellant-appellee South African Marine opposes Elgie's appeal and also cross-appeals against appellee, ITO for indemnity for any judgment that may be rendered against it in favor of Elgie. The indemnity point was raised on the first appeal but was never discussed by the original panel. This brief is intended to supplement South African Marine's brief in the original appeal.

Statement of Facts

Elgie & Company, a South African corporation, ordered certain optical equipment from Shuron Continental, a Rochester, New York manufacturing corporation, in the latter part of 1973. Included in the equipment was an optical generator - a grinding machine - invoiced for $8670. (495a,574a) The generator was packed in a single crate in Tampa, Florida (513a) and trucked to the Jamaica, New York warehouse of Shuron's freight forwarder, Copeland Shipping, who arranged for the shipment's ocean transportation. (137a) On March 13, 1974 the generator, together with 11 cartons of optical machinery, was trucked to the Brooklyn Army Base pier at 60th Street in Brooklyn where it was signed for by an employee of ITO, who operated the pier and made all arrangements for storing cargo and loading it on board vessels. (249a,590a). The generator was described on the dock receipt as "one crate" (590a).

The original copy of the dock receipt had indicated that the shipment was to be carried on board the S.A. Morgenster (576a) but the ocean carrier's copy was later changed to indicate that the carrying vessel would be the S.A. Nederburg (590a). This change was made because ITO had

advised South African Marine that the shipment had not gone forward on Morgenster and so the dock receipt was changed to designate the Nederburg, the next scheduled vessel. (251a)

When cargo was shut out of a South African Marine vessel ITO would notify the steamship company by sending it copies of the dock receipts for the shipments that had not gone forward so that South African Marine would not issue bills of lading for the cargo that was shut out. (255a) South African Marine had received an envelope from ITO containing dock receipts for cargo which had been shut out from Morgenster. (251a) The dock receipt for the present shipment (596a) was included in the group of receipts for shipments which had been shut out. (254a) The receipt was not marked to indicate that any part of the shipment had gone forward on Morgenster. (254a)

On March 21, 1974 the S.A. Nederburg arrived in New York and berthed at the 59th Street Pier in Brooklyn. From March 21 through March 24, ITO loaded and stowed cargo in all hatches of the S.A. Nederburg, including the 11 cartons of optical equipment which accompanied the generator.

Following the departure of Nederburg on March 24, South African Marine's documentation

manager examined a list of the dock receipts, which had been received from ITO, indicating the shipments that had been shut out from the Nederburg. (265a) The bill of lading which had been prepared for this shipment was then stamped "on board" after the steamship company reviewed the dock receipts ITO had sent to confirm that the cargo was on board. (282a) The bill of lading, and the manifest of the Nederburg indicated that all 12 packages had been shipped "on board".(486a,604a)

Later, it developed that the crate containing the generator in fact went forward on board the Morgenster. A tally sheet indicated that a package of "parts" relating to the dock receipt for this shipment was loaded on board Morgenster(622a). The ITO checker who tallied the package on board Morgenster had no doubt that it went on board. (430a) And since the remaining 11 packages in the 12 package shipment outturned in South Africa from the Nederburg, the package loaded on Morgenster could only be the crate containing the optical generator. Yet South African Marine had been notified that all twelve packages in the shipment had been shut out from Morgenster. (258a)

THE DISTRICT COURT OPINION

In its first opinion, the District Court found that the large crate containing the optical generator was "probably" loaded on board Morgenster, (6a) and indicated that the stevedores were "primarily at fault for failure to load all the cargo on the Morgenster." (23a) The court below found that South African Marine was also responsible, in part, because it found that the ocean carrier was to some degree negligent and responsible for the issuance of the erroneous bill of lading." (26a) Although the District Court did not specifically state in what respect the steamship company was negligent it refused to grant South African Marine indemnity from ITO.

Pursuant to the direction of this Court, the District Court on remand specifically considered the application of §22 of the Pomerene Act, 49 U.S.C. §102, and concluded that it did not apply because Elgie could not establish that it had relied upon any misdescription of the goods in the bill of lading nor that the damages were caused by such a misdescription. In addition, the District Court made more specific findings of fact concerning the loading of the crate on board the S.A. Morgenster

and concluded, on the strength of seven distinct findings of fact, that"[the crate] was loaded and went forward on the Morgenster." Opinion on remand, at 9. And the Court specifically found that the loss of the shipment was caused by ITO's sloppy record keeping. Opinion on remand at 7.

QUESTIONS PRESENTED

1. Was the District Court correct in holding that Elgie could not prove that it relied upon any alleged misdescription in the bill of lading within the meaning of §22 of the Pomerene Act, 49 U.S.C. §102.

2. Was the District Court correct in holding that Elgie could not prove that its damage was caused by any misdescription in the bill of lading within the meaning of §22 of the Pomerene Act.

3. Did the District Court err in failing to grant South African Marine indemnity from ITO, including reasonable attorneys fees.

POINT I

THE DISTRICT COURT'S FINDING THAT THE CRATE WENT FORWARD ON BOARD MORGENSTER IS FULLY SUPPORTED BY THE EVIDENCE

As the District Court found in its first opinion, this case is essentially a simple matter of breach of a maritime contract. As such, it is governed by the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1300 et. seq. The provisions of COGSA, of course, apply of their own force to every bill of lading for carriage of goods by sea to or from ports of the United States. 46 U.S.C. §1300.

One of the significant protections that COGSA affords the steamship company is the right to limit the vessel's liability for loss or damage to goods to an amount of $500 per package or more. 46 U.S.C. §1304(5). This protection was set forth in Clause 13 of South African Marine's long form bill of lading. (594a) In turn, the provisions of South African Marine long form bill of lading were incorporated by reference into the bill of lading which was issued for this shipment (486a) and into the dock receipt for this shipment. (576a) The court below found that the incorporation of the $500 limitation of liability through the dock receipt and

short form bill of lading was valid, and the District Court's finding in this respect has not been challenged on appeal. (20a)

Relying on the well established law concerning the steamship company's right to limit liability, the Court below held that plaintiff's recovery on account of the missing crate was limited to $500. Plaintiff now challenges this finding claiming that, notwithstanding the steamship company's undoubted receipt of the shipment, the cargo interest has been a victim of "fraud" because there is no conclusive proof as to where the crate disappeared. Hence, Elgie seeks to invoke the provisions of the Pomerene Act, 46 U.S.C. §102, asserting that it has relied upon the description of the goods in the bill of lading, and upon their being shipped "on board" the Nederburg to its detriment.

But to prove that it relied on the representation of a false bill of lading the cargo interest must first prove that the bill of lading was false. Elgie must contravene the District Court's finding that the crate in question was, in fact, loaded on board the S.A. Morgenster. The need to discredit the District Court's finding arises not only from the obvious observation that a consignee could almost never be harmed on account of a ship-

ment going forward in advance of the date on the bill of lading, but also by the candid admission of the shipper's freight forwarder that it made no difference if the shipment went forward on a different vessel from the one on which it was booked. (184a) Thus plaintiff sets out to impeach each of the seven findings of fact which the District Court relied on to conclude that the shipment went forward on board the S.A. Morgenster.

It would be a waste of this Court's time to refute, individually, each of plaintiff's impassioned criticisms of the District Court's findings of fact. It is enough to observe that the findings are solidly based, either on evidence that was presented at trial or upon reasonable inferences to be drawn from that evidence. Significantly, plaintiff does not claim that any of the findings of fact made by the District Court were clearly contradicted by the evidence. Elgie's only claim is that the findings were not properly supported by the evidence. Thus, this is not a situation such as that in J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F.2d 580 (2d Cir. 1971) in which the district court clearly misunderstood the evidence before it. (In Sabine Howaldt, the district court's opinion that the vessel was unseaworthy was based on an assumption,

plainly contradicted by the log book, that the vessel encountered sustained winds of no greater than force 10. Id at 586-587.)

It is submitted that plaintiff's argument amounts to nothing more than quibbling with the District Court. As this Court observed in American President Lines v. Towboat Seneca, 384 F.2d 511, 514 (2d Cir. 1967):

> . . . in considering the decision below we must take into account all the evidence in the record. It would distort the process of judicial review if we were to isolate artificially a single step in the reasoning of the trial judge, find fault with it and then hasten to the conclusion that his decision must be reversed, albeit his conclusions are sound and firmly grounded in the record and the balance of his findings. We deal in totalities and not in abstract indicia of decision. For, as the Supreme Court has reminded us, the ''clearly erroneous'' rule of civil actions is applicable to suits in admiralty and we are not free to upset the trial court's findings unless we have ''the definite and firm conviction that a mistake has been committed." [citations omitted]

The District Court's finding that the crate was loaded on board the Morgenster was based on seven independent findings of fact, several of which involve assessing the credibility of witnesses.

Certainly this is not a situation in which an appellate court, on the entire evidence, could be left with the "definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co. 333 U.S. 364,395 (1948).

POINT II

SECTION 22 OF THE POMERENE ACT, 49 U.S.C. §102 DOES NOT APPLY TO AN ORDINARY NON-DELIVERY

Having attempted to discredit the District Court's explicit finding that the crate containing the optical generator was in fact loaded on board the S.A. Morgenster, plaintiff's counsel then proceeds to posit that the crate was not loaded on any vessel in order to claim that the cargo interest was the victim of a "constructive fraud." Plaintiff thus attempts to circumvent the "package limitation" of COGSA, 46 U.S.C. §1304(5) by invoking §22 of the Pomerene Act, 49 U.S.C.§102, which provides in part that:

> If a bill of lading has been issued by a carrier . . . the carrier shall be liable to . . . (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the non-receipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue.

Plaintiff's argument is ingenious, but unfounded. It is premised on the assumption that the optical generator was not loaded on any South African Marine vessel - an assumption which is directly contradicted by the District Court's finding that the crate was loaded on board Morgenster. But even if the crate had not been loaded on a South African Marine vessel the Pomerene Act still would not apply because, as the District Court correctly found, the Act only applies either when a carrier has not in fact received the goods or when the description of the goods, as opposed to their "on board" status, has been intentionally misrepresented.

Plaintiff's attempt to recover under the Pomerene Act fails, in the first instance, for want of proof that the missing crate was not loaded on board a South African Marine vessel. Plaintiff asserts that it relied on the "on board" designation on the bill of lading in that the letter of credit for the shipment would not have been negotiated if the bill of lading required to draw down the letter of credit had not been stamped "on board." But the record patently reveals that plaintiff cannot establish such reliance.

The District Court found, on the strength of seven distinct findings of fact, that the optical generator had, in fact, been loaded on board the S.A. Morgenster. This substitution was expressly permitted by Clause 2 of the carrier's long form bill of lading. (594a) And the manager of Elgie's freight forwarder, Copeland Shipping, testified that there was no requirement from the bank that the bill of lading designate a particular vessel and that if the shipment went forward on a different vessel from the one for which it was originally booked it was a matter of no concern. (184a) Clearly the "on board" requirement in the letter of credit was intended to insure only that the letter of credit would not be drawn down unless the goods were actually in transit on board some vessel. The specific identity of the vessel and the precise date of shipment were not matters of concern.

The burden of proof is significant in this respect. For in seeking to circumvent the package limitation protection of the Carriage of Goods by Sea Act, 46 U.S.C. §1304(5) plaintiff also necessarily avoids the COGSA structure concerning the burden of proof. Plaintiff cannot make out a prima facie case of fraud by merely placing the bill of lading into evidence and proving that the crate was not delivered.

Plaintiff's own authorities hold that "each and every element of the fraud must be established by clear and convincing evidence." U.S. Fibres, Inc. v. Proctor & Schwartz, Inc. 358 F. Supp. 449,460 (E.D. Mich. 1972), aff'd 509 F.2d 1043 (6th Cir. 1975). The requirement of "clear and convincing evidence," of course, is even more demanding then the "preponderence of the evidence" requirement that is the usual burden of proof in civil cases. Cf. Hobson v. Eaton, 399 F.2d 781,785 (6th Cir. 1968), cert, denied 394 U.S. 928 (1969).

Cases construing the Pomerene Act confirm that the plaintiff must affirmatively prove that it relied on the statements in the bill of lading to its detriment. Pacific Micronesian Line v. New Zealand Insurance Co., 366 F.2d 333, 336 (9th Cir. 1966). As this court held in Freedman v. Concordia Star, 250 F.2d 867,869 (2d Cir. 1958): "An estoppel in pais operates in favor of a person who has been misled; and the party invoking the principle of estoppel has the burden of proving that he has acted to his detriment in reliance upon what the other party had done."

In the case at bar plaintiff has not sustained its burden of proving that it relied upon the representation that the crate containing optical

equipment was on board Nederburg rather than Morgenster. Nor has plaintiff sustained the burden which it must carry if it is to recover under the Pomerene Act, rather than under COGSA, of proving that the crate was not loaded on board Morgenster. Ironically although plaintiff complains that the District Court's decision on remand was rendered without receiving any additional evidence, it is plaintiff who failed to present the additional evidence that would have been necessary to prove that the bill of lading was fraudulently issued.

But even if we were to accept plaintiff's contention that the crate was not loaded either on the Morgenster or the Nederburg, the Pomerene Act still would not apply to the situation at bar. Section 22 of the Pomerene Act, 49 U.S.C. §102, has been described as "a codification of the estoppel principle." Portland Fish Co. v. States Steamship Co., 510 F.2d 628,631 (9th Cir. 1974). The act was drafted in an attempt to curb a continuing practice of issuing fraudulent bills of lading in the Texas cotton trade. Supreme Court decisions had held that the act of an agent of a carrier in issuing a bill of lading without actually receiving any goods was ultra vires, and not binding on the carrier even when the bill of lading passed into the hands of

innocent purchasers for value. Pollard v. Vinton, 105 U.S. 7, (1881); Friedlander v. Texas & Pacific Railway Co., 130 U.S. 416 (1889). As a result, many steamship and railroad agents deliberately conspired with the shipper to issue bills of lading purporting to state that cargo had been received by a railroad or steamship line when, in fact, it had not. The Act was not intended to bring about a fundamental change in the principles of estoppel but rather to bind carriers for the acts of their agents. See A. Knauth, The American Law of Ocean Bills of Lading, 388-394 (4th ed. 1953); Josephy v. Panhandle & Sante Fe Railway, 235 N.Y. 306 (1923). Although the Carriage of Goods by Sea Act, which was adopted after the Pomerene Act, specifically provides in 46 U.S.C. §1303(4) that the Pomerene Act was to remain unaffected, there was nc indication that the passage of COGSA would serve to expand the coverage of the Pomerene Act to cases in which the falsity of a bill of lading was not the product of a deliberate misrepresentation.

In the final analysis, plaintiff has failed to sustain its burden with respect to three key elements of proof: (1) it has failed to prove that the crate was not in fact loaded on board Morgenster or Nederburg; (2) it has failed to prove

that it relied upon the bill of lading's representation that the shipment was on board the Nederburg; (3) it has failed to prove that the bill of lading was issued with the knowledge that the crate was not on board. Thus, plaintiff cannot invoke the protection of the Pomerene Act and its damages are properly limited to $500.

POINT III

THE VESSEL OWNER IS ENTITLED TO INDEMNITY FROM THE STEVEDORE FOR PLAINTIFF'S JUDGMENT AND COUNSEL FEES

In its original decision, the District Court declined to grant the steamship company indemnity from ITO. South African Marine continues to take issue with the District Court's conclusion that the steamship company was not entitled to indemnity from the stevedore.

The original opinion of the District Court found that: "the stevedores may be primarily at fault for failure to load all the cargo on the Morgenster. . . . " (23a) However, the Court declined to grant South African Marine indemnity because it found that "both the ocean carrier and the stevedore were, to some degree, negligent and responsible for the issuance of the erroneous bill of lading." (26a) The Court then held, for reasons

that are obscure, that the loss of the shipment could not be attributed to the issuance of the erroneous bill of lading, and thus that it had not been proved that the stevedore's negligence was the proximate cause of the loss. (26a-27a)

Significantly, the District Court made no specific findings of fact to support its conclusion that the steamship company had been negligent. The closest the District Court came to identifying any negligence by the steamship company was when it observed, in a footnote, that a written notation on South African Marine's dock receipt (590a) indicated that "Anthony" advised that he had stowage for 11 pieces. The court found that this notation supported the stevedore's contention that it "gave a notification, albeit somewhat late, of the fact that it held eleven pieces of plaintiff's cargo (and not twelve)." (32a)

South African Marine submits that this finding cannot properly support any inference of negligence by the steamship company. Not only is the message itself ambiguous and open to many interpretations, but it is directly contradicted by the testimony of South African Marine's documentation manager that ITO had specifically omitted to advise the steamship company that the crate containing the

optical generator had gone forward on Morgenster in the customary manner of marking the dock receipts for cargo that had been partially shut out. (252a-253a) Although ITO's location man, Richard J. Ries, testified that it was ITO's practice to notify South African Marine by telephone of cargo that had been shut out (448a) - a practice which is conveniently impossible to verify through any sort of written documentation - the testimony of John Minutello of South African Marine to the contrary was supported by lists prepared from dock receipts of cargo shut out from the Morgenster and the Nederburg (600a, 602a).

In its second opinion the District Court more specifically indicated that the loss of the goods was directly due to ITO's poor record keeping and not to any fault on the part of the steamship company. The District Court found:

> As the original opinion of this Court noted, the absence of adequate records was caused in great part by a change in the procedures used by the stevedores in notifying the shipping line of failures to load ("shut outs") and, in particular, "split shipments." Without such notice, the shipping line could not take precautions against the loss of the goods and, therefore, the sloppy records upon which the case now turns, apparently caused the loss in the beginning.
>
> Opinion on remand at 7.

In light of this finding that the loss of the shipment was caused by the stevedore's failure to keep adequate records, it is clear that the District Court's finding of concurrent negligence by the steamship company in its earlier opinion was in error. Cf. Sabine Howaldt, supra. ITO, as the stevedore and terminal operator, had custody and control of the crate. It alone could have known on what vessel the crate was sent forward and had the obligation to insure that the steamship company was duly notified. ITO's failure to notify South African Marine clearly was a breach of its warranty of workmanlike service. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); Master Shipping Agency, Inc. v. M.S. Farida, 571 F.2d. 131 (2d Cir. 1978); Stein Hall & Co. v. S.S. Concordia Viking, 494 F.2d 287 (2d Cir. 1974).

As pointed out in South African Marine's main brief, the award for indemnity to which the steamship company is entitled properly includes reasonable attorneys fees and fees and expenses. Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser, 507 F.2d 68 (2d Cir. 1974), cert. denied 421 U.S. 965 (1975); Nichimen Co., v. M.V. Farland, 462 F.2d 319 (2d Cir. 1972); A.C. Israel

Commodity Co. v. American West African Line, 397 F.2d 170 (3d Cir.), cert. denied 393 U.S. 798 (1968); David Crystal, Inc. v. Cunard Steamship Co., 339 F.2d 295 (2d Cir. 1964), cert. denied 380 U.S. 976 (1965); Eutectic Corp. v. M/V Gudmundra, 1974 A.M.C. 255 (S.D.N.Y. 1973) (not officially reported).

CONCLUSION

THE DISTRICT COURT PROPERLY LIMITED PLAINTIFF'S RECOVERY TO $500. PLAINTIFF CANNOT SUSTAIN ITS HEAVY BURDEN OF PROVING FRAUD ON THE PART OF THE STEAMSHIP COMPANY IN ISSUING THE BILL OF LADING OR IN ESTABLISHING ANY VIOLATION OF §22 OF THE POMERENE ACT, 49 U.S.C. §102.

THE LOSS OF THE GOODS WAS CLEARLY CAUSED BY ITO'S NEGLIGENCE AND SOUTH AFRICAN MARINE IS ENTITLED TO FULL INDEMNITY FROM ITO INCLUDING REASONABLE COUNSEL FEES FOR BREACH OF ITO'S WARRANTY OF WORKMANLIKE SERVICE.

Respectfully submitted,

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